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No. 06-11

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IN THE

Supreme Court of the United States

KAREN LECLERC, *et al.*,

Petitioners,

v.

DANIEL E. WEBB, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF *AMICUS CURIAE* THE INNOCENCE NETWORK FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

The Innocence Network respectfully moves this Court, pursuant to Rule 37.2(b) of the Supreme Court of the United States, for leave to file the attached brief *amicus curiae* in support of the petitions for a Writ of Certiorari, Nos. 05-1645 and 06-11, to the United States Court of Appeals for the Fifth Circuit. Both sets of Petitioners have consented in writing to the filing of this brief. Respondents have not consented.

Petitioners have briefed the legal aspects of this case concerning the equal protection and preemption analyses, the conflicting appellate decisions, and the Fifth Circuit's disregard of this Court's prior precedent. The Innocence Network's attached brief does not repeat those arguments. Rather, this brief focuses on the circumstances under which the Louisiana Supreme Court changed its interpretation of Louisiana Bar Rule XVII, Section 3(B) ("Rule 3(B)"), and the harmful effects Rule 3(B) has on indigent criminal defendants in light of the shortage of criminal defense attorneys in Louisiana.

The Innocence Network, an association of nonprofit legal clinics and criminal justice resource centers across the country, has an interest in ensuring adequate representation for the indigent charged with crimes, as well as indigent prisoners who do not even have the benefit of the typically under-funded lawyers assigned by the State. Innocence Network projects play a strong leadership role in reforming the criminal justice system by formulating legislative and administrative remedies for the root causes that lead to wrongful convictions, such as eyewitness misidentification, false confessions, unreliable or fraudulent forensic science, and law enforcement misconduct. Such reforms not only protect the innocent, but also help law enforcement apprehend the real perpetrator.

Moreover, one of the Innocence Network's members, the Innocence Project New Orleans ("IPNO"), is based in Louisiana. IPNO has throughout its existence employed nonimmigrant alien attorneys. In fact, IPNO's current Director,

Petitioner Emily Maw, is one of the attorneys precluded from practicing law in Louisiana under the Fifth Circuit's ruling. Therefore, the Innocence Network is uniquely situated to comment on the harmful effects Rule 3(B) will have on Louisiana's indigent criminal defendants, its prison population, and important reform efforts to improve Louisiana's criminal justice system generally.

Over the past thirteen years, highly-trained nonimmigrant alien attorneys have been coming to Louisiana to represent indigent criminal defendants and to advocate for improved funding for indigent defense work in the State. The success of these lawyers is well documented. While the Fifth Circuit viewed Rule 3(B) as purportedly protecting the citizens of Louisiana from transient foreign lawyers who will abandon their clients, in fact the rule targets these hard-working and committed attorneys and deepens the vulnerability of Louisiana's neglected prison and indigent defendant population. Moreover, if the Fifth Circuit's ruling stands, other States could be emboldened to pass additional restrictions targeting nonimmigrant alien lawyers.

For the above reasons, we respectfully request that the Court grant this motion for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. There Is a Grave Shortage of Criminal Defense Lawyers in Louisiana.	4
II. Putting *Bourke* in Context: Rule 3(B) Targets Foreign Attorneys Intending to Represent Louisiana's Indigent Criminal Defendants and Prisoner Population.	7
A. Before *Bourke*: The Successful Representation of Indigent Criminal Defendants.	8
B. *Bourke*: The Louisiana Supreme Court's New "Interpretation" of Rule 3(B).	13
C. Rule 3(B), as Reinterpreted, Is the Product of Invidious Discrimination.	15
III. *Bourke* Prevents Qualified Foreign Attorneys From Representing Indigent Criminal Defendants.	16
IV. If *LeClerc* Stands, the Potential Harm Extends Outside Louisiana's Borders.	18
CONCLUSION	20

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Page

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INTEREST OF *AMICUS CURIAE*[1]

Nationwide, the Innocence Network includes more than thirty affiliated Innocence Projects, each of which provides *pro bono* legal services to indigent prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence.[2] The Innocence Network pioneered the litigation model that has to date exonerated at least 182 innocent persons by post-conviction DNA testing alone, serving as counsel in the majority of these cases. Countless innocent persons have been vindicated in total, allowing the authorities to pursue the true perpetrators.

The Innocence Project New Orleans ("IPNO") is a member of the Innocence Network. Nonimmigrant alien attorneys have

[1] *Amicus* certifies that this brief was written by undersigned counsel, and that no counsel for a party authored any portion of this brief or made any monetary contribution to its preparation or submission.

[2] The member organizations include the Arizona Justice Project, Association in the Defense of the Wrongly Convicted (Canada), Barbara C. Salken Criminal Justice Clinic at Pace University (New York), California/Hawaii Innocence Project, Center on Wrongful Convictions at Northwestern (all states), Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Florida Innocence Initiative, Georgia Innocence Project, Idaho Innocence Project (Idaho, Montana, eastern Washington), Griffith University Innocence Project (Australia), Indiana University School of Law Wrongful Convictions Component, Innocence Institute at Point Park University (Pennsylvania), The Innocence Project (all states), Innocence Project Indiana, Innocence Project Midwest (Missouri, Kansas, Iowa), Innocence Project of Minnesota, Innocence Project Northwest (Alaska, Washington), Iowa/Nebraska Innocence Project, Innocence Project New Orleans (Louisiana and Mississippi), Lois and Richard Rosenthal Institute for Justice/Ohio Innocence Project, Maryland Office of the Public Defender, Innocence Project, Medill Innocence Project (all states), Mid Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Rocky Mountain Innocence Project, Second Look Program (New York), Texas Center for Actual Innocence, Texas Innocence Network, University of Melbourne Innocence Project (Australia), University of Leeds Innocence Project (United Kingdom), Wesleyan Innocence Project (Texas), and Wisconsin Innocence Project (all states).

played a pivotal role in IPNO's work on behalf of indigent criminal defendants. IPNO was founded by a nonimmigrant alien attorney in 2001, before the current interpretation of Louisiana Bar Rule XVII, Section 3(B) ("Rule 3(B)"), was adopted. The current Director of IPNO is Emily Maw, one of the Petitioners in these consolidated cases. Although Ms. Maw holds a law degree from Tulane University School of Law and meets all other qualifications for admission to the Louisiana Bar, Rule 3(B) precludes her from representing IPNO and its clients in the courts of Louisiana as a duly-licensed practicing attorney. Given the history of nonimmigrant alien lawyers who have come to Louisiana to represent indigent criminal defendants, *amicus* has a strong interest in ensuring that Rule 3(B) does not prevent IPNO from functioning effectively and from further marginalizing the indigent client population it serves.

SUMMARY OF ARGUMENT

The Fifth Circuit's ruling not only departs from this Court's Equal Protection jurisprudence, but also ignores the context in which Rule 3(B) was reinterpreted by the Louisiana Supreme Court in *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002). This background is critical because it demonstrates Louisiana's desire to exclude foreign attorneys who come to Louisiana to represent indigent criminal defendants, reverse convictions and sentences of the innocent, and improve the criminal justice system. This is exactly the type of invidious discrimination the Equal Protection Clause is meant to interdict.

To understand the context in which *Bourke* was decided, it is first necessary to understand the state of the criminal justice system in Louisiana. There is a severe shortage of criminal defense attorneys handling indigent defense cases in Louisiana. Public defenders carry caseloads far in excess of the maximum recommended by the American Bar Association. The funding allotted to indigent defense is woefully inadequate, and, perhaps not surprisingly, Louisiana leads the nation in the frequency of wrongful convictions and guilty defendants routinely receive grossly disproportionate sentences.

Consequently, the State has become a Mecca for nonimmigrant alien attorneys seeking to improve the representation of indigent criminal defendants, particularly in capital cases. These foreign lawyers, led by Clive Stafford Smith, who came to New Orleans in 1993, became members of the Louisiana Bar under the Louisiana Supreme Court's former interpretation of Rule 3(B). They founded human rights organizations in Louisiana, engaged in litigation to improve funding for indigent defense, and began representing indigent criminal defendants and prisoners in post-conviction and retrial proceedings. As a result of these skilled foreign attorneys, the number of capital charges in Louisiana was reduced by 84% over a two and one-half year period. Convictions were overturned, sentences were reduced, and funding was improved – all of which led to a backlash, particularly from prosecutors.

It was against this backdrop that the Louisiana Supreme Court overruled its prior precedent and decided to prevent nonimmigrant alien attorneys from becoming members of the Louisiana Bar. The purported reason for the reinterpretation of Rule 3(B) is that nonimmigrant alien attorneys pose more of a transience risk to their clients than do citizen or permanent resident alien attorneys. But the facts surrounding *Bourke* tell a different story. There were no complaints against foreign attorneys, only improved funding for indigent defense, zealous representation of poor defendants charged with serious crimes, and vindication of the innocent. Even the 2000-2001 Chairperson of the Louisiana Supreme Court Bar Admissions Advisory Committee has said that the real reason behind *Bourke* was invidious discrimination. As such, Rule 3(B) is a constitutionally impermissible regulation.

Rule 3(B) is also having its intended result. Nonimmigrant alien attorneys – including Petitioners Emily Maw and Caroline Wallace – cannot become members of the Louisiana Bar despite their qualifications. Foreign attorneys have been limited to working as paralegals, or forced to continue their human rights work in neighboring States. Rather than protecting its population from transient attorneys, Louisiana

is depriving its most vulnerable citizens of effective legal representation. Moreover, if the Fifth Circuit decision stands, it could embolden neighboring States – and other States around the country – to adopt similar restrictions targeting nonimmigrant aliens. This would be a step backward, only serving to further alienate the United States from the larger international human rights community.

ARGUMENT

I. There Is a Grave Shortage of Criminal Defense Lawyers in Louisiana.

The state of the indigent criminal defense system in Louisiana is so bleak that, according to a report by In Defense of Public Access to Justice, "it calls into question the ability of the entire criminal court system to dispense justice accurately and fairly." [3] Louisiana failed nine out of ten national indigent defense standards that "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney." [4] The systemic ineffective assistance of counsel that pervades Louisiana's indigent defense system stems from simple mathematics: there are too few public defenders handling too many cases.[5] Given the massive caseloads carried by public defenders, it is impossible for them to spend any meaningful amount of time with one particular defendant.[6] Consequently,

[3] Catherine Beane, *Gideon Shattered Justice Stands Still in Avoyelles Parish, Louisiana*, 27-MAR Champion 6, 7 (2004).

[4] *Id.* at 8-9 (citing *LJC Adult Report Card, LJC Report Card on Adult Indigent Defense Services: ABA 10 Principles of a Public Defense Delivery System*, http://www.lajusticecoalition.org/reports+resources/report+card+adult/ (last visited Aug. 2, 2006)).

[5] *Id.* at 12-13.

[6] *Id.* at 10. Indeed, many public defenders interview their clients for the first time in the minutes preceding their hearings and do not even meet their clients outside the courtroom. *Safe Streets/Strong Communities, Who Pays the Price for Orleans Parish's Broken Indigent Defense System? A Summary of Investigative Findings*, (Released March 2006), http://www.lajusticecoalition.org/doc/SSSC-Orleans-Parish-Study.pdf (last visited Aug. 2, 2006).

Louisiana leads the nation in the frequency of wrongful convictions.[7] Innocent defendants are condemned with startling frequency and guilty defendants commonly receive sentences grossly disproportionate to their crimes.[8]

Statistics graphically depict the shortage of criminal defense attorneys handling indigent defendant cases in Louisiana. Avoyelles Parish is a rural jurisdiction in central Louisiana that served as the primary focus of an indigent defense assessment commissioned by the National Association of Criminal Defense Lawyers and researched and written by the National Legal Aid & Defender Association. It is a microcosm of the situation plaguing all of Louisiana.[9] Avoyelles Parish employs four part-time felony public defenders, each of whom handles a caseload equivalent to 166% of the national felony caseload standard, without factoring in private caseloads or indigent defense cases handled in other judicial districts.[10] For example, in addition to her Avoyelles Parish public defender cases, one felony public defender also represented 476 felony defendants in Rapides Parish, four of whom were charged with capital offenses.[11] This is over three times the national felony caseload standard without factoring in her Avoyelles Parish caseload or the time required to adequately defend a person's life against capital charges.[12] Based on her caseload, the study estimated that this attorney is able to give each client an average of only two hours of her time.[13]

Public defenders in other Louisiana jurisdictions are as overwhelmed as those in Avoyelles Parish. Part-time public

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[7] *Katrina's Impact: Hurricane Brings Attention to Long Broken Public Defense System*, (Summer 2006), http://www.lajusticecoalition.org/news/katrina/ (last visited Aug. 2, 2006).

[8] *Id.*

[9] Beane, *supra* note 3, at 13.

[10] *Id.* at 12.

[11] *Id.*

[12] *Id.*

[13] *Id.*

defenders in Calcasieu Parish carry felony caseloads that exceed national standards by an average of 440 felonies.[14] Likewise, public defenders in East Baton Rouge have an average caseload that is 3.21 times the maximum recommended by American Bar Association standards, with one particular public defender handling 1,248 cases in one year – almost ten times the recommended limit.[15] According to the East Baton Rouge Public Defender's Office, it would have to shed 68.8% of its current caseload to meet constitutional standards.[16]

Woefully insufficient funding is the main reason for the egregious shortage of public defenders in Louisiana.[17] Not even close to enough money is allocated to indigent criminal defense to support the number of public defenders necessary to provide indigent criminal defendants in Louisiana with adequate representation.[18] Moreover, the funds public defenders in Louisiana do receive barely enable them to keep their law offices open, let alone pay out-of-pocket litigation costs for necessities such as case investigations, expert witnesses, and social service assistance.[19] The result is, unsurprisingly, severely inadequate representation of indigent criminal defendants throughout Louisiana.

To make matters worse, Hurricane Katrina dealt a devastating blow to the already-beleaguered Louisiana indigent defense system. In particular, Katrina left the Orleans Parish criminal justice system in shambles.[20] Louisiana is the

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[14] *Id.* at 13.

[15] Julia Robb, *Public Defender System on Trial*, Daily Town Talk (Alexandria, LA), Feb. 9, 2004, at 4A.

[16] *Id.*

[17] *Katrina's Impact*, *supra* note 7.

[18] Beane, *supra* note 3, at 8-9.

[19] *Id.*

[20] *Hurricane Katrina*, http://www.thejusticecenter.org/lcac/katrina (last visited Aug. 2, 2006).

only State in the nation that attempts to fund its indigent defense services primarily through fees collected from traffic tickets.[21] In Orleans Parish, for example, local revenue generated through traffic tickets accounted for 75% of the public defender office budget.[22] But due to the destruction caused by Hurricane Katrina, traffic tickets simply are not being written anymore.[23] As a direct result, the Orleans Parish Public Defenders Office – which was already understaffed before the hurricane – had to lay-off thirty-six of its forty-two pre-Katrina public defenders.[24]

Yet despite the pressing need for additional attorneys to assist its indigent criminal defendant population, Louisiana – through its Supreme Court's 2002 interpretation of Rule 3(B) in *Bourke* – has chosen to *prevent* attorneys dedicated to helping indigent criminal defendants from doing so.

II. Putting *Bourke* in Context: Rule 3(B) Targets Foreign Attorneys Intending to Represent Louisiana's Indigent Criminal Defendants and Prisoner Population.

In upholding Rule 3(B)'s ban against nonimmigrant alien attorneys, the Fifth Circuit viewed the rule not as the product of invidious discrimination, but as a safeguard against the so-called "transience" of such attorneys. *LeClerc v. Webb*, 419 F.3d 405, 421-22 (5th Cir. 2005). But a review of the recent history of successful criminal defense work by nonimmigrant aliens in Louisiana, and the reaction such success precipitated from Louisiana prosecutors, shows otherwise. Indeed, the events leading up to the Louisiana Supreme Court's new "interpretation" of Rule 3(B) show that the rule is being used to prevent certain nonimmigrant aliens from serving as defense attorneys to Louisiana's indigent population, and constitutes

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[21] *Katrina's Impact*, *supra* note 7.

[22] *Id.*

[23] *Id.*

[24] *Id.*

precisely the kind of invidious discrimination the Equal Protection Clause is meant to guard against.[25]

A. Before *Bourke*: The Successful Representation of Indigent Criminal Defendants.

The history of nonimmigrant aliens coming to Louisiana to represent indigent criminal defendants, especially in capital cases, begins with Clive Stafford Smith. Stafford Smith came to the United States to attend Columbia Law School after graduating from Radley College in England. After law school, Stafford Smith was an intern, and then a staff attorney, at the Southern Center for Human Rights in Atlanta. In 1993, Stafford Smith moved to New Orleans and founded the Louisiana Crisis Assistance Center (now called the Louisiana Capital Assistance Center) ("LCAC"). The existence of LCAC, along with the increased criticism of capital punishment overseas, set the stage for dozens of idealistic Australian and U.K. lawyers to come to Louisiana to defend capital cases and work for the reform of indigent defense funding in the State.[26]

Shortly after LCAC was founded in 1993, it was involved in litigation that targeted Louisiana's under-funded indigent defense system. At that time, the maximum fee a criminal

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[25] This is not the first time the Louisiana Supreme Court has amended Louisiana's Bar rules in response to the success of *pro bono* attorneys. In 1999, the Louisiana Supreme Court amended the Louisiana Law Student Practice Rule to restrict law student representation of individuals and community organizations after clinical law students and faculty at the Tulane Environmental Law Clinic stopped the construction of a $700 million polyvinyl chemical plan in an area with eleven existing chemical plants and over 130 other industrial plants known as "Cancer Alley," a predominantly Black, lower-income community in Louisiana. *See* Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 Tul. L. Rev. 235, 237-43 (1999); Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 Wash. U. J.L. & Pol'y 33, 144-45 (2000).

[26] *News & Notes with Ed Gordon: British Attorneys Defending U.S. Death Row Inmates*, NPR Radio Broadcast, December 13, 2005 (describing LCAC as "a funnel" for British lawyers to come to the U.S.); Dana Mulhauser, *British Lawyers are Rushing to the Defense of Death-Row Inmates – In the American South*, 2005-DEC Legal Aff. 14.

defense attorney could earn in a capital trial was $1000.[27] As a result of *State v. Peart*, 621 So. 2d 780 (La. 1993), Louisiana established the Louisiana Indigent Defender Board and devoted $7 million to indigent defense in the State.[28] Five years later, LCAC sought to further improve the standard of capital defense in Louisiana by establishing the Orleans Parish Preliminary Hearing Project (the "OPPHP"). The OPPHP allowed LCAC attorneys to provide intensive assistance to all defendants charged with a capital offense in Orleans Parish. Just two and one-half years after the program was started, the OPPHP helped conclude 84% of the capital prosecutions pending in Orleans Parish, resulting in the dismissal of the charges in 100 of the 119 cases.[29]

The success of LCAC is due in large part to the lawyers' commitment to using exhaustive investigation to defend capital indictments. LCAC's emphasis on investigation has lead to the establishment of A Fighting Chance, an agency of investigators that specializes in developing mitigation evidence for criminal defendants facing the death penalty in Louisiana.[30] Continuing its efforts to help ensure that indigent criminal defendants receive a fair trial, LCAC conducted a study in 2003, known as the Blackstrikes study, which probed the process of jury selection and challenged racial bias in the jury system in Jefferson Parish, Louisiana, a suburban "white-flight" community of New Orleans. The Blackstrikes study revealed that Jefferson Parish prosecutors were three times more likely to strike a black juror than a white juror.[31]

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[27] Claire Schaeffer-Duffy, *Rare Breed: Death Penalty Lawyers Defend Rights of Politically Invisible*, http://www.natcath.com/NCR_Online/archives/100501/100501a.htm (last visited Aug. 2, 2006).

[28] About the Louisiana Capital Assistance Center, http://www.thejusticecenter.org/lcac/about.html (last visited Aug. 2, 2006); *Louisiana's System, Public Defender Funding Varies*, http://www.lajusticecoalition.org/indigent+defense/louisiana+system/ (last visited Aug. 2, 2006).

[29] About the Louisiana Capital Assistance Center, *supra* note 28.

[30] *Id.*

[31] *Id.*; Louisiana Capital Assistance Center Projects, http://www.thejusticecenter.org/lcac/lcac_projects.html (last visited Aug. 2, 2006); Blackstrikes, http://www.blackstrikes.com (last visited Aug. 2, 2006).

In addition to LCAC's policy work, Clive Stafford Smith (the Director of LCAC until 2004) is estimated to have handled more than 300 capital cases throughout his career in the United States, overturning death sentences in all but four.[32] Stafford Smith was awarded an OBE[33] for humanitarian services, and his legal skills have been lauded by distinguished members of the American Bar Association and American legal academics.[34] Although an examination of all of his successes is beyond the scope of this brief, two of Stafford Smith's Louisiana cases prove illustrative.

After being sentenced to death in Louisiana, Clarence Smith received the right to a new trial because the jury was allowed to convict him without concluding that he was guilty "beyond a reasonable doubt."[35] At his retrial, Stafford Smith showed that the prosecution's case was based solely on evidence from two criminals who had made deals with the prosecution in return for their testimony.[36] Among other things, Stafford Smith uncovered the fact that these two criminals had committed two thousand felonies, possibly including as many as twenty homicides, each of which was covered by the government's grant of immunity.[37] The defendant was subsequently acquitted, and he was released from prison.

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[32] Mulhauser, *supra* note 25, at 14; *Lawyer Interview: Living Legend*, The Lawyer, July 7, 2003, at 13.

[33] An OBE is an Officer of the British Empire, a British Order of Chivalry.

[34] *See* Anthony Lewis *et al.*, *Panel Discussion, The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 Hous. L. Rev. 1105, 1192 (1994); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 Penn St. L. Rev. 1133, 1134 (2005).

[35] The trial judge's instructions described the level of doubt required to acquit as "grave uncertainty, substantial, actual, or serious doubt." *See State v. Smith*, 600 So. 2d 1319, 1327 (La. 1992).

[36] Lewis, *supra* note 34, at 1192.

[37] *Id.*

Another capital case that received substantial pretrial publicity in Louisiana involved Shareef Cousin, who was charged with the shooting death of a man outside a popular restaurant in the French Quarter.[38] In his zeal to convict, the prosecutor did not inform the defense that on the night of the murder, the one eyewitness to the crime told the police that she did not get a good look at the gunman's face and that she probably would not be able to identify him.[39] Nor did the prosecutor disclose that, in an interview three days later, she admitted that she was not wearing her glasses or contact lenses on the night of the murder and could only see patterns and shapes.[40] Without the benefit of this information, the jury convicted Cousin of first-degree murder and sentenced him to death. At the post-conviction and retrial proceedings, Stafford Smith uncovered the exculpatory evidence, leading to the case's dismissal and a civil suit and disciplinary action against the prosecutor.[41]

In addition to the criminal defense work done by LCAC and Stafford Smith, the Innocence Project New Orleans ("IPNO") has also achieved great success defending indigent criminal defendants in Louisiana. IPNO was founded in 2001 by Emily Bolton, another nonimmigrant alien attorney from the U.K., who was admitted to practice in Louisiana before *Bourke*.[42] Two of the many prisoners that Bolton helped exonerate each spent over twenty-seven years in prison for a crime they did not commit.[43] Greg Bright and Earl Truvia were

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[38] Hoeffel, *supra* note 34, at 1134.

[39] *Id.* (citing *State v. Cousin*, 710 So. 2d 1065, 1066-67 (La. 1998)).

[40] *Id.*

[41] *Id.*

[42] Innocence Project New Orleans People, http://www.ip-no.org/people.htm (last visited Aug. 2, 2006).

[43] Innocence Project New Orleans Cases, http://www.ip-no.org/cases.htm (last visited Aug. 2, 2006); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 161 (2003).

convicted of second-degree murder and sentenced to life without parole. Their convictions were based solely on the testimony of a supposed eyewitness. But the jury never heard from the coroner, who would have testified that the real time of death did not correlate with the time the eyewitness claimed she saw the murder.[44] Moreover, IPNO revealed that the eyewitness was on heroin, suffered from auditory and visual hallucinations, and gave the police information in exchange for cash.[45] After an evidentiary hearing in 2002, where IPNO demonstrated the above facts, the Louisiana Supreme Court reversed the defendants' convictions and ordered a new trial. Subsequently, the Orleans Parish District Attorney dismissed all charges.[46]

Stafford Smith, Bolton, and their associates at LCAC and IPNO – mainly nonimmigrant alien attorneys from the U.K. and Australia – have represented indigent criminal defendants and prisoners despite the poor pay and long hours. Joe Cook, Executive Director of the Louisiana branch of the American Civil Liberties Union, noted, "Foreign-born lawyers, working as volunteers or for very little, often are the only ones willing to take on death row cases."[47] Capital case defense work pays so little in Louisiana that there is apparently a saying that the only attorneys willing to do it are "the town drunk or the kid just out of law school."[48]

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[44] Innocence Project New Orleans Cases, *supra* note 43; Medwed, *supra* note 43, at 160-61.

[45] Innocence Project New Orleans Cases, *supra* note 43; Medwed, *supra* note 43, at 160-61.

[46] Innocence Project New Orleans Cases, *supra* note 43.

[47] *Federal Appeal Court to Hear State Rule Against Foreign Lawyers*, The Associated Press State & Local Wire, Oct. 3, 2004, at State and Regional section.

[48] Anne Simpson, *The Lifesaver of Death Row: Clive Stafford-Smith is a Briton who Dedicates His Life to Defending the Condemned in the U.S.*, The Herald, March 26, 2004, at 16; *Lawyer Interview: Living Legend*, The Lawyer, July 7, 2003, at 13.

B. *Bourke*: The Louisiana Supreme Court's New "Interpretation" of Rule 3(B).

Not surprisingly, the efforts of the foreign lawyers at LCAC and IPNO to assert the rights of their indigent clients earned them the enmity of Louisiana prosecutors and certain members of the public. Stafford Smith and others who do similar work in Louisiana have received death threats and complaints from police and prosecutors.[49] John Sinquefield, an assistant district attorney in Baton Rouge, told the Dallas Morning News in 2002, "I'm certain that I could raise some money to buy Stafford Smith a one-way ticket back to England. I'd be happy – very happy – to do that."[50] Further, Wayne Frye, the first assistant district attorney for Louisiana's Calcasieu Parish, stated that, "we have an adequate system of indigent defense here," and assailed the foreign lawyers as "other people coming and meddling in our business."[51]

It was in this context that the Louisiana Supreme Court reinterpreted Rule 3(B) in *Bourke*. Notably, Richard Bourke, the individual who prompted the Louisiana Supreme Court's reinterpretation of Rule 3(B), came to Louisiana from Australia to assist Stafford Smith at LCAC.[52] Prior to *Bourke*, Louisiana – like virtually every other State – was content to allow nonimmigrant aliens to become members of the Bar. In the early 1980s, the Louisiana Supreme Court expressly held that the term "resident alien" means an "alien who is lawfully residing in the United States." *In re Respondek*, 442 So. 2d 435, 435 (La. 1983); *see also In re Appert*, 444 So. 2d 1208, 1208 (La. 1984). Yet in 2002, after as detailed above, years of

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[49] *See* Andrew Buncombe, *Goodbye to Death Row: Briton Who Gave Hope to the Hopeless Goes Home*, The Independent (London), June 24, 2004, at First Edition; NEWS section.

[50] *Lawyer Interview*, *supra* note 48.

[51] Mulhauser, *supra* note 25, at 15.

[52] James Gill, Editorial, *Foreign Attorneys Await Decision of Import*, Times-Picayune (New Orleans), October 5, 2003, at 7.

nonimmigrant aliens successfully representing indigent clients in Louisiana, the Louisiana Supreme Court overruled its decisions in *Respondek* and *Appert* without explanation, and held that the term "resident alien" only applies "to those aliens who have attained permanent resident status in the United States." *Bourke*, 819 So. 2d at 1022.

There is no reason to believe that the Louisiana Supreme Court's sudden about face in *Bourke* was grounded on any concern over the "transience" of nonimmigrant alien attorneys in Louisiana. As Stephen Griffin, Professor of Law at Tulane University School of Law in New Orleans, noted, "There have been no ethical complaints against a foreign lawyer, no allegations. The ruling just came out of the blue."[53] Indeed, the Court's opinion does not mention any concern about the "transience" of nonimmigrant alien attorneys. As Judge Fallon stated, "If the Louisiana Supreme Court were concerned with transience, the Rule would be calculated to address that problem directly." *Wallace v. Calogero*, 286 F. Supp. 2d 748, 763, (E.D. La. 2003), *rev'd*, *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005). Aside from the argument that nonimmigrant aliens are only allowed in the United States for a fixed period of time, Respondents have provided no statistical proof, or proof of any kind, that nonimmigrant alien attorneys are more of a "transience" risk than citizen or immigrant alien attorneys. Nor has the Louisiana Supreme Court followed the recommendation of two of its Justices in calling for a committee to study this issue and provide a recommendation to the Louisiana Supreme Court. *See Bourke*, 819 So. 2d at 1022 (Calogero, C.J., dissenting) ("The court's action today illustrates the necessity for . . . a committee."); *In re Marty*, 819 So. 2d 278, 278 (La. 2002) (Johnson J., concurring) (supporting an appointing committee to study the issue).

Against this backdrop, it is clear that Rule 3(B), as reinterpreted, was specifically designed to prevent

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[53] Doug Simpson, *Lawsuit Challenges Louisiana Ban on Nonresident Foreigners Taking Bar Exam*, Associated Press, May 6, 2003, at Domestic News section.

nonimmigrant aliens from serving as defense attorneys to Louisiana's indigent population. According to Dane S. Ciolino, Chairperson of the Louisiana Supreme Court Bar Admissions Advisory Committee from 2000 to 2001, "The real reason behind the rule change is that the district attorneys absolutely hate these people, because they are passionate about these cases, and they work the DAs to death." [54]

C. Rule 3(B), as Reinterpreted, Is the Product of Invidious Discrimination.

Prejudice against foreign lawyers is nothing new. As one commentator has noted, "Disdain of foreign lawyers has been embedded in the American legal tradition." [55] Yet the discrimination is compounded in this case, because here, Louisiana has specifically targeted a group of foreign lawyers whose mission it is to represent another politically unprotected and historically-disadvantaged group, the indigent prisoner population.

Rule 3(B) violates the Equal Protection Clause. As both Petitioners demonstrate in their Petitions for a Writ of Certiorari, the Fifth's Circuit's ruling in *LeClerc* squarely conflicts with this Court's holding that, "Classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discreet and insular' minority . . . ." *In re Griffiths*, 413 U.S. 717, 721 (1973) (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)) (internal citation omitted). *Griffiths* did not carve out an exception for nonimmigrant aliens and, as demonstrated below, there is no justifiable reason to do so. Rule 3(B) should be analyzed under strict scrutiny.

Even if rational basis were to apply to Rule 3(B), the rule would still violate the Equal Protection Clause. The concern

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[54] Mulhauser, *supra* note 26, at 15; Biographical Information for Dane S. Ciolino, http://www.loyno.edu/~dciolino/Biographical_Info/bio.htm (last visited Aug. 2, 2006).

[55] Kiyoko Kamio Knapp, *Disdain of Alien Lawyers: History of Exclusion*, 7 Seton Hall Const. L. J. 103, 103 (1996).

over a nonimmigrant alien's "transience" that purportedly justifies Rule 3(B) is not supported by the facts. As this Court stated in *Romer v. Evans*, a law upheld under rational basis must be "narrow enough in scope and grounded in a *sufficient factual context* for [the Court] to ascertain some relation between the classification and the purpose it serve[s]." 517 U.S. 620, 632-33 (1995) (emphasis added). Rule 3(B) does not satisfy that test. *See also U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection under the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest.").

III. *Bourke* Prevents Qualified Foreign Attorneys From Representing Indigent Criminal Defendants.

Rule 3(B), as reinterpreted, is serving its intended purpose. Two examples suffice to demonstrate the point.

In 2004, after Emily Bolton returned to the U.K. to care for ailing family members, Emily Maw took over as Director of IPNO. Maw is a nonimmigrant alien attorney from Wales and one of the Petitioners in these consolidated cases. Maw was inspired to come to Louisiana after hearing that it has the highest incarceration rate in the United States, with more than 36,000 prisoners.[56] Louisiana also imposes the longest sentences, with 3,808 prisoners serving life without parole, and holds ninety-two death row inmates awaiting lethal injection.[57] In 2003, however, in part because of Rule 3(B), IPNO began allocating some of its resources to Mississippi.[58] Maw, a 2003 graduate of Tulane Law School, is licensed to practice

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[56] Gareth Morgan, *A Welsh 'Angel of Mercy' is Fighting to Prove the Innocence of US Lifers and Prisoners on Death Row. Now the Americans Want to Stop Her...*, Western Mail and Echo Ltd, October 11, 2004, at 1.

[57] *Id.*

[58] Jackson, *Innocence Project Opening Office in Mississippi - Legal-Aid Clinic Has Helped to Exonerate 131 Convicted*, The Commercial Appeal, Aug. 5, 2003, at DS8.

law in Mississippi and has already developed an impressive track record of exonerating the innocent and reversing wrongful convictions there.[59]

In Louisiana, IPNO is currently trying to overturn the conviction of Travis Hayes, a man serving a life sentence for allegedly driving the getaway car in a 1997 homicide of a grocery store owner.[60] Hayes' friend, Ryan Mathews, was convicted as the gunman and sent to death row. *See State v. Hayes*, 806 So. 2d 816, 820-21 (La. Ct. App. 2001). But in 2004, Matthews was released after five DNA tests failed to establish any link between Matthews and clothing – including a ski mask – thrown from a car fleeing the crime scene.[61] In fact, the DNA evidence linked the ski mask used in the murder to another man, Rondell Love, who is serving a sentence for a separate homicide committed six months after the grocer was killed.[62] Despite Matthews' exoneration, and the undisputed fact that Hayes was with Matthews on the night of the murder, Hayes is still serving a life sentence at the Louisiana State Penitentiary at Angola. Although IPNO, led by Maw, was instrumental in reopening Hayes' case, Rule 3(B) precludes Maw from representing Hayes in the current court proceedings addressing his innocence.

Similarly, Caroline Wallace, one of the other Petitioners in these consolidated cases, cannot sign pleadings or represent

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[59] Earlier this year, Maw helped exonerate Cedric Willis, a Mississippi man who spent twelve years in prison for a murder and robberies he did not commit. In September 2005, based largely on the exculpatory evidence brought to light by Maw, the court reversed Willis' conviction and granted him a new trial. Upon joint motion of the defense and the State, the court dismissed the charges against him. Jimmie E. Gates, *Man Released After 12 Years in Prison*, The Clarion-Ledger, March 7, 2006, at 1A.

[60] Innocence Project New Orleans News, http://www.ip-no.org/news.htm (last visited Aug. 2, 2006).

[61] *Id.*; Henry Weinstein, *One Man Goes Free, Another Waits*, L.A. Times, July 27, 2006, at 22.

[62] Innocence Project New Orleans News, *supra* note 60; Weinstein, *supra* note 61.

defendants in Louisiana's courts. Wallace has a law degree from Cambridge University, and is licensed to practice law in England and Wales. Although she has sat for and passed the Louisiana Bar Exam, her current work is limited to paralegal duties for the Capital Post Conviction Project of Louisiana. For the past three years, Wallace has been working closely with the Innocence Project New York and a prominent Minnesota law firm to prove that Damon Thibodeaux, a young man sitting on death row in Louisiana, is innocent, convicted by a false confession. Although critical proceedings on the case are beginning this month, and Wallace is one of the most knowledgeable attorneys about Thibodeaux's case, Rule 3(B) precludes Wallace from representing him.

In sum, Rule 3(B)'s purported goal of protecting the citizens of Louisiana from transient foreign attorneys is having the opposite effect on one of Louisiana's most vulnerable and underserved populations. As Judge Fallon anticipated, Rule 3(B) is certainly "depriving the public of excellent legal representation" in Louisiana. *See Wallace*, 286 F. Supp. 2d at 764.

IV. If *LeClerc* Stands, the Potential Harm Extends Outside Louisiana's Borders.

In *LeClerc*, the Fifth Circuit carved out a nonexistent exception to this Court's equal protection jurisprudence involving discrimination based on alienage, and paved the way for further discrimination against nonimmigrant aliens. As noted above, Louisiana's Rule 3(B) has encouraged nonimmigrant alien attorneys to become licensed in neighboring States and to shift their representation to the indigent criminal defendants and prisoners there. If *LeClerc* stands, however, and Mississippi and Texas are motivated to institute similar restrictions on the practice of law, *LeClerc* virtually guarantees that the restrictions will be upheld as constitutional. Moreover, *LeClerc* could embolden other States outside of the Fifth Circuit's jurisdiction to discriminate against nonimmigrant alien attorneys. To the extent these foreign attorneys are working in the United States to exonerate

wrongfully-convicted prisoners or represent indigent defendants, excluding them would weaken the United States' position in the international community, particularly with regard to human rights.

Over the past few years, this Court has taken an increased regard of international law in its decisions implicating human rights. In *Atkins v. Virginia*, for example, this Court referenced an amicus curiae brief filed by the European Union in favor of banning the execution of the mentally ill. 536 U.S. 304, 316 n. 21 (2002). Similarly, in *Lawrence v. Texas*, this Court referred to the European Court of Human Rights for evolving standards of decency regarding sexual orientation. 539 U.S. 558, 573 (2003). And, most recently, in *Roper v. Simmons*, international opinion weighed heavily in this Court's decision to overturn the juvenile death penalty. 543 U.S. 551, 575-78 (2005). According to Justice Kennedy, "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty .... The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Id.* at 578. The Fifth Circuit's opinion in *LeClerc*, however, represents a step in the opposite direction. In order for the United States to remain active participants in the global human rights arena, there must be more, not less, dialogue between United States and foreign attorneys.

CONCLUSION

For the foregoing reasons, the Innocence Network respectfully urges this Court to grant the Petitions for a Writ of Certiorari.

Respectfully submitted,

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